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No. 08-223

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

McWANE, INC., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the "significant nexus" standard described by the opinion concurring in the judgment in *Rapanos v. United States*, 547 U.S. 715, 767 (2006) (Kennedy, J.), establishes the exclusive rule of law for determining whether particular streams are "waters of the United States" covered by the Clean Water Act (CWA), 33 U.S.C. § 1362(7), even in cases where CWA coverage has been established under the standards adopted by the four-Justice plurality in *Rapanos* and by the four *Rapanos* dissenters.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner United States of America.[1]

PLF was founded thirty-five years ago and is recognized as the largest and most experienced nonprofit legal organization of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide, advocating limited government, individual rights, and free enterprise. PLF attorneys have litigated dozens of cases nationwide on the scope and application of federal environmental statutes, including the Clean Water Act. PLF attorneys represented John Rapanos before this Court in *Rapanos v. United States*, 547 U.S. 715 (2006), the interpretation of which is the subject of the present Petition. PLF attorneys also have participated in virtually every circuit court case interpreting the *Rapanos* decision. *See United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006);

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[1] Pursuant to this Court's Rule 37.2, all parties with counsel listed on the docket have consented to the filing of this brief. Counsel of record for all listed parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

United States v. Johnson, 467 F.3d 56 (1st Cir. 2006). PLF submits that this litigation experience on the subject of the Petition will provide a useful additional viewpoint to assist the Court in its consideration of this case.[2]

SUMMARY OF ARGUMENT

In *Rapanos*, a five-Justice majority of this Court held that federal jurisdiction did not extend to wetlands under the CWA based solely on a hydrological connection between those wetlands and a navigable-in-fact waterway downstream. But this Court split on the test for establishing such jurisdiction. A four-Justice plurality interpreted the CWA narrowly to cover traditional rivers, lakes, and streams connected to navigable-in-fact waters, and those wetlands indistinguishable from these waters. But Justice Kennedy, concurring in the judgment, interpreted the CWA broadly so as to reach any wetland with a "significant nexus" to navigable-in-fact waters. 547 U.S. at 767.

The federal Circuit Courts of Appeals are split on how to apply this Court's *Rapanos* decision. The First Circuit expressly rejected the "significant nexus" test as solely controlling and held that Clean Water Act jurisdiction could be extended to inland waters based on either Justice Kennedy's concurrence or the *Rapanos* plurality's test. *United States v. Johnson*, 467 F.3d 56. In *United States v. Lucas*, the Fifth Circuit

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[2] While Amicus supports the Petition for purposes of clarifying both *Marks* and *Rapanos*, *see* below, Amicus does not support Petitioner's effort to have this Court overturn the lower court's decision that Petitioner did not establish federal CWA jurisdiction over the properties in question.

declined to adopt any controlling opinion in *Rapanos*, instead holding that "the government has jurisdiction over waters that neighbor tributaries of navigable waters." 516 F.3d 316, 326 (5th Cir. 2008). The Seventh Circuit, in *Gerke*, and the Ninth Circuit, in *N. California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006), have decided like the Eleventh Circuit in this case that the "significant nexus" test is controlling.

These circuit rulings conflict with this Court's analysis in *Marks v. United States*, 430 U.S. 188, 193 (1977). In *Marks*, this Court declared that in fragmented decisions "the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments on the narrowest grounds.*" (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)) (emphasis added). Under a literal reading of *Marks*, the "narrowest grounds" in *Rapanos* consists of the plurality position, because it is a logical subset of the "significant nexus" test. But, as is the case with applying *Rapanos*, there is general disagreement among the circuit courts over how (and when) to apply *Marks*. Therefore, review by this Court is necessary not only to resolve the conflict among the circuits as to enforcement of the Clean Water Act, but also to clarify this Court's interpretive rules for all split decisions.

REASONS FOR GRANTING THE WRIT

I

CIRCUITS ARE SPLIT ON HOW TO APPLY THIS COURT'S DIVIDED OPINIONS

A. *Marks v. United States*

In *Marks*, this Court was clear: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. at 193 (quoting *Gregg*, 428 U.S. at 169 n.15). Although this rule has been difficult to apply, *see below*, this Court has established *Marks* as the only sanctioned approach for interpreting its split decisions. *See In re Michael Francis Cook*, 322 B.R. 336, 341 (2005) ("The only approach approved by the Supreme Court is the 'narrowest grounds' approach.").

The language of *Marks* was not unique to that case. It was derived from this Court's decision in *Gregg*, 428 U.S. 153. *Gregg* examined *Furman v. Georgia*, 408 U.S. 238 (1972), a case presenting a constitutional challenge to a Georgia death penalty statute. In *Furman*, five Justices joined in the judgment of the Court and concluded that the death penalty as administered in Georgia was unconstitutional. This Court, however, split on the legal rule to support its conclusion. Two Justices who concurred in the judgment contended that capital punishment is unconstitutional in all cases, whereas the remaining Justices in the majority concluded only

that the particular death penalty law at issue was unconstitutional, leaving open the possibility that other death penalty laws may pass constitutional muster.

In *Gregg*, this Court anticipated the *Marks* rule through its reading of *Furman*:

> Since five Justices wrote separately in support of the judgments in Furman, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .

Gregg, 428 U.S. at 169 n.15. Since the narrowest of the *Furman* majority opinions concluded that only the death penalty law at issue was unconstitutional, this Court in *Gregg* held that the split *Furman* opinions should not be interpreted to hold that the death penalty always violates the Constitution. *Id.* at 169.

In *Marks* itself, this Court was presented with the question of whether certain materials, determined by the lower courts to be obscene, enjoyed First Amendment protection. This Court concluded that the pertinent legal rule was to be found in its split decision in *Memoirs v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413 (1966), in which six Justices reversed a lower court's judgment that a novel deemed obscene was not protected under the First Amendment. Three Justices in the *Memoirs* majority agreed with the lower court that obscene materials are not constitutionally protected, but rejected as too lax the lower court's standard for constitutionally unprotected obscenity. *See id.* at 418-19 (opinion of Brennan, J., joined by Warren, C.J., and Fortas, J.).

Two other Justices in the *Memoirs* majority joined in the judgment on the grounds that, because the First Amendment protects obscenity however defined, the novel in question was constitutionally protected. *Memoirs*, 383 U.S. at 421 (Black, J., concurring); *id.* at 433 (Douglas, J., concurring). A sixth Justice also concurred, writing that all forms of obscenity save hardcore pornography are protected under the First Amendment. *Id.* at 421 (Stewart, J., concurring).

The *Marks* Court concluded that the *Memoirs* three-Justice rule, imposing a heightened standard for regulation of obscenity, was the decision's narrowest grounds because the opinions giving a First Amendment shield to all forms of obscenity provided a much broader protection. *Marks*, 430 U.S. at 193. *Marks* thus gave birth to the "logical subset" analysis. *See Johnson*, 467 F.3d at 63-64 (citing *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)). That is, a given rationale for a split opinion is a decision's narrowest grounds, and thus controls, if it is a "logical subset" of the other rationales for the decision:

> The Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule. That is, if a statute is found to be constitutionally permissible pursuant to a strict scrutiny standard of review, then it is necessarily permissible pursuant to a rational basis standard of review. From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same.

Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-04 (1992). Thus, every statute that passes strict scrutiny also survives rational basis review, but the converse is not true. Therefore, the opinion applying strict scrutiny would comprise this example's narrowest grounds under *Marks*.[3]

B. Courts Do Not Uniformly Apply *Marks* and Its Narrowest Grounds Analysis

In several substantive contexts, both lower courts and this Court have demonstrated difficulty (or reluctance) in applying *Marks* to fractured decisions. The result, as Chief Justice Roberts wrote in *Rapanos*, is that "[l]ower courts and regulated entities [ ] have to feel their way on a case-by-case basis." 547 U.S. at 758. Such an approach is the antithesis of the uniform administration of justice this Court's decisions should engender.

In *Student Public Interest Research Group of New Jersey, Inc. v. AT & T Bell Labs.*, 842 F.2d 1436 (3d Cir. 1988), the Third Circuit interpreted this Court's split decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*. In that case, this Court held that enhancements to the lodestar for attorneys' fees under the Clean Air Act, for assuming the risk of nonpayment, were improper. 483 U.S. 711 (1987). A plurality of four Justices contended that such

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[3] As Petitioner correctly points out in its Petition for Writ of Certiorari at 23 n.8, "the *Marks* test is designed to identify a legal principle," and not to "gauge narrowness based on empirical predictions about the overall frequency with which various standards will produce an overall result."

enhancements always are improper, *id.* at 729-30, whereas Justice O'Connor, concurring separately, argued that such enhancements are not always improper, but that they were in the specific case under review, *id.* at 731 (O'Connor, J., concurring in part and concurring in the judgment). The Third Circuit, applying *Delaware Valley*, concluded that because the dissent in that case would have approved of enhancements generally—and because Justice O'Connor approved of enhancements under certain circumstances—a majority of this Court in *Delaware Valley* would hold that enhancements are proper if Justice O'Connor's standards were met. *Student Public Interest Research Group*, 842 F.3d at 1451.

In so deciding, the Third Circuit never discussed *Marks*. Under *Marks*, the "narrowest grounds" of *Delaware Valley* would be Justice O'Connor's opinion, but only for the proposition that, under the circumstances present in that case, enhancements are improper. Importantly, *Marks* would not authorize a rule from the other side of the *Delaware Valley* coin; that is, a rule that would affirmatively approve of enhancements where Justice O'Connor's conditions are met. That conclusion is a function of *Marks*'s mandate that a court interpreting this Court's split decision must look *only* to the opinions of the Justices concurring in the opinion, *Marks*, 430 U.S. at 193, and therefore must ignore any dissents. As the Eleventh Circuit held in this case, looking to dissenting Justices is "inconsistent with *Marks*" because under that case, the opinion of dissenting Justices "is of no moment."

United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007).[4]

Exclusive attention to the opinions of Justices joining in the judgment is a necessary practice in any split decision analysis, because the views of dissenting Justices play no legitimate interpretive role. This is true as a matter of fidelity to *Marks* and as a necessary tribute to the foundations of Article III jurisprudence. Reliance upon dissenting Justices' views is unfounded because federal courts may only expound the law to the extent that their opinions are tied to a judgment; that is to the extent that the courts resolve an actual "Case or Controversy." *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (Federal courts have no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.") (citation omitted). Given that the views of dissenting Justices have no effect, by definition, on the Court's disposition of an actual case or controversy, it follows that their views as to the controlling rule of law are without binding power. *See Robison*, 505 F.3d at 1221 ("We are controlled by the decisions of the Supreme Court. Dissenters, by definition, have not joined the Court's decision.").

Among the most conspicuous examples of a split decision applied differently by various circuits is this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In *Bakke*,

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[4] Amicus is cognizant of Petitioner's support for incorporating dissents into analyses of this Court's plurality decisions, *see* Petition for Writ of Certiorari at 24-25, and disagrees with Petitioner's argument in this regard.

this Court examined the constitutionality of a medical school admissions program that set aside admissions slots for members of racial minorities. As this Court wrote twenty-five years later in a decision to clarify *Bakke*'s fractured decision:

> The decision produced six separate opinions, none of which commanded a majority of the Court. Four Justices would have upheld the program against all attack on the ground that the government can use race to "remedy disadvantages cast on minorities by past racial prejudice." Id., at 325, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). Four other Justices avoided the constitutional question altogether and struck down the program on statutory grounds. Id., at 408, 98 S.Ct. 2733 (opinion of Stevens, J., joined by Burger, C. J., and Stewart and Rehnquist, JJ., concurring in judgment in part and dissenting in part). Justice Powell provided a fifth vote not only for invalidating the set-aside program, but also for reversing the state court's injunction against any use of race whatsoever.

Grutter v. Bollinger, 539 U.S. 306, 322 (2003).

In the midst of *Bakke*'s splintered opinions, Justice Powell's concurrence that race-conscious admissions programs, if designed to mold a racially diverse student body--an opinion joined by no other Justice—became "the touchstone for constitutional analysis of race-conscious admissions policies." *Id.* at 323 (citing *Bakke*, 438 U.S. at 311). Yet it was not

universally applied as such in the circuit courts. In the Eleventh Circuit, for example, the court held, over two decades after *Bakke*, that Justice Powell's diversity concurrence was not the holding of this Court, and thus did not control. *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234 (11th Cir. 2001). As this Court noted in *Grutter*, the Fifth Circuit similarly disregarded Justice Powell's concurrence as controlling, *Hopwood v. Texas*, 236 F.3d 256, 274-75 (5th Cir. 2000), while courts such as the Ninth Circuit held the diversity rationale to be governing law, *Smith v. University of Washington Law School*, 233 F.3d 1188, 1199 (9th Cir. 2000). *See Grutter*, 539 U.S. at 325.

The judicial, political, and social consequences of this divided application of a fractured decision resulted in one of the most contentious issues in daily American life, and necessitated this Court's revisiting of the matter in *Grutter*. Even then, though, this Court did not decide the issue pursuant to *Marks*, writing that the Court "do[es] not find it necessary to decide whether Justice Powell's opinion is binding under *Marks*," because it was not "useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Grutter*, 539 U.S. at 325 (quoting *Nichols v. United States*, 511 U.S. 738, 746 (1994)).

With admissions such as this one from even this Court, it is not surprising that lower courts sometimes are reluctant to apply *Marks* at all. Several circuits have reacted to their queasiness over *Marks* by ignoring its rule and adopting an ad-hoc approach to interpreting this Court's fragmented decisions. This approach involves divining which grounds might, in

theory, find favor with five Justices. In *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992), for example, the court concluded: "In essence, what we must do is find common ground shared by five or more justices." So too the Ninth Circuit: "We need not find a legal opinion which a majority joined, but merely a 'legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.'"). *United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) (citing *Planned Parenthood v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991)).

Some courts attribute their failure to strictly adhere to *Marks* to that case's lack of function in certain factual settings. This Court, in *Grutter*, wrote that there are instances where application of *Marks* is "more easily stated than applied to the various opinions supporting the result," 539 U.S. at 325. As the D.C. Circuit in *King v. Palmer* explained, *Marks* is most easily applied where one opinion can "represent a common denominator of the Court's reasoning" and "embod[ies] a position implicitly approved by at least five Justices who support the judgment." 950 F.2d at 781. But, when

> one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow

> that approach with controlling force, no matter how persuasive it may be.

Id. at 782.

An illustration of *Marks*'s aptness in some settings, as opposed to others, stems from this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). In *Eastern Enterprises*, this Court held that the retroactive application of the Coal Industry Retiree Health Benefit Act to Eastern Enterprises was unconstitutional. A plurality of Justices, in an opinion authored by Justice O'Connor, held that the Act effected a taking, and reached that conclusion by applying the multi-factor regulatory takings test set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *See Eastern Enterprises*, 524 U.S. at 529. Justice Kennedy, concurring separately, agreed that the Act was unconstitutional as applied, but contended that the result flowed from a due process analysis, and not from a takings framework. 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part).

Lower courts were faced with the questionable applicability of *Marks*, because neither the plurality's takings test, nor Justice Kennedy's substantive due process test, is a logical subset of the other. At least two circuits resolved this dilemma by applying *Eastern Enterprises* only in situations where plaintiffs "stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence," in practice limiting this Court's decision to its facts. *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999); *see also Mary Helen Coal Corp. v. Hudson*, 164 F.3d 624 (4th

Cir. 1998) (judgment for appellant because case was "materially indistinguishable from *Eastern*"). Other lower courts disposed of cases based on hypothesizing which holding might potentially find the support of five of this Court's Justices. *See Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001) (citing various authorities for the proposition that "regulatory actions requiring the payment of money are not takings"). In sum, courts' difficulty in applying *Marks* to a split decision not amenable to a Venn Diagram compelled the courts to disregard the *Marks* test altogether.

This uneasiness may well be valid, and numerous commentators have written to that effect and offered either glosses on *Marks* or wholesale substitutes for this Court's rule. *See* Melissa M. Berry, et al., *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After Rapanos*, 15 Va. J. Soc. Pol'y & L. 299, 333-40 (2008); Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 Wash. U.J. L. & Pol'y 261, 280-86 (2000); Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 447-57 (1992); Linda Novak, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756, 769-74 (1980). But whatever the merits of these criticisms of *Marks*, the fact remains that *Marks* is this Court's controlling decision for interpreting the Court's split decisions. Like this Court's other controlling opinions, *Marks* does not permit lower courts to disregard its holding where those courts think another interpretive tool would be more appropriate. This Court should

grant the Petition in this case either to reaffirm and clarify its commitment to *Marks* with regard to any of its split decisions, or to fashion a new interpretive rule for dealing with such opinions.

II

THIS COURT SHOULD GRANT THE PETITION TO CLARIFY ITS DECISION IN *RAPANOS*

A. There Are Multiple Post-*Rapanos* Conflicts in the Lower Courts

Post-*Rapanos* CWA cases are the most recent example of confusion over how to apply this Court's split decisions. The result is that whether a person may make productive use of his land, and whether he faces criminal penalties including prison time for CWA violations, depends on the federal circuit in which he resides.

In *Gerke*, which also involved a jurisdictional challenge to federal regulation of inland wetlands, the Seventh Circuit putatively relied on *Marks* to interpret *Rapanos*, but it changed the wording of the *Marks* rule and thus misapplied this Court's test. In *Gerke*, the court cited *Marks* for the proposition that

> [w]hen a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose. In *Rapanos*, that is Justice Kennedy's ground.

464 F.3d at 724 (citations omitted). In the Seventh Circuit, as in the Eleventh Circuit opinion in this case, the "significant nexus" standard controls.

The Seventh Circuit's adulterated version of the *Marks* rule allowed the court to aggregate the four dissenters in *Rapanos* with Justice Kennedy to find the five Justices that would support Justice Kennedy's "significant nexus" standard for establishing federal jurisdiction over wetlands under the CWA. However, the court ignored the more persuasive argument that when the plurality standard is applied to find federal jurisdiction, it would have the support of all nine Justices. Nevertheless, under *Marks*, finding the support of five Justices is not the controlling standard.

The First Circuit, in *United States v. Johnson*, found it curious that the *Gerke* court equated "narrowest ground" with the opinion "least restrictive of federal authority." 467 F.3d at 61. Although the cases on which *Marks* relied involved situations in which the "narrowest grounds" was the least restrictive of federal jurisdiction, the First Circuit observed that this was mere coincidence, and that it "does not necessarily mean that the Supreme Court in *Marks* equated the 'narrowest grounds' . . . to the grounds least restrictive of the assertion of federal authority." *Id.* at 63. "Such an equation," the First Circuit stated, "leaves unanswered the question of how one would determine which opinion is controlling in a case where the government is not a party." *Id.* Given the constitutional issue raised, the court found it "just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality)." *Id.* This, according to the court, is because "that

ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause." *Id.*

In conclusion, and in contrast with the Seventh Circuit's reading of *Marks* in *Gerke*, the First Circuit in *Johnson* opined that the "narrowest grounds" might sensibly be interpreted to mean the "less far-reaching-common ground," or the opinion "most clearly tailored to the specific fact situation before the Court and thus applicable to the fewest cases." *Id.* The court held that the "significant nexus" standard in *Rapanos* is not a "logical subset" of the plurality standard for federal jurisdiction over wetlands: "The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction." *Id.* at 64. However, the First Circuit failed to consider the obvious possibility that the plurality standard is a "logical subset" of Justice Kennedy's standard. The First Circuit rejected *Gerke*'s conclusion that under *Marks* Justice Kennedy's lone concurrence is controlling in *Rapanos*. Instead, the First Circuit ultimately brushed aside *Marks*, writing that it "does not translate easily to the present situation, *id.* at 64, and held that "[t]he federal government can establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*." *Id.* at 60.

In *N. California River Watch*, the Ninth Circuit adopted the approach of the Seventh Circuit, and anticipated the Eleventh Circuit's opinion in the present case, by holding that Justice Kennedy's "significant nexus" standard is controlling in *Rapanos*. And in the most confused of all post-*Rapanos* circuit court cases, the Fifth Circuit in *Lucas* applied the

jurisdictional tests of the *Rapanos* plurality, the concurrence, *and* the dissent as if they were all of equal validity without so much as a mention of the *Marks* rule. It then declared that "the government has jurisdiction over waters that neighbor tributaries of navigable waters." 516 F.3d at 326. This "neighboring" test is not found anywhere in the *Rapanos* decision. The Fifth Circuit introduced its own standard and conjured an additional conflict among the circuits. This conflict creates a substantial disparity among the circuits in the enforcement of the Clean Water Act, one that requires reconciliation by this Court.

B. Practical Concerns of Fairness and Justice Warrant Granting the Petition

Since the promulgation of the Clean Water Act, the Army Corps of Engineers and the Environmental Protection Agency have failed to follow a consistent jurisdictional test for regulated wetlands. A report from the General Accounting Office confirms that the Corps' local districts "differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the [Act's] jurisdiction." U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs To Evaluate Its District Office Practices In Determining Jurisdiction* 3 (Feb. 2004) (GAO Report).[5]

In addition to interdistrict inconsistencies, the GAO Report concluded that even corps staff working in

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[5] *Available at* www.gao.gov/new.items/d04297.pdf (last visited Sept. 13, 2008)

the same office cannot agree on the scope of the Clean Water Act and that "three different district staff" would likely make "three different assessments" as to whether a particular water feature is subject to the Clean Water Act. GAO Report at 22. This is more than a theoretical concern. This degree of uncertainty permeates the enforcement decisions of the Corps. As *Rapanos* and its progeny demonstrate, those decisions become the basis for multimillion dollar fines and criminal prosecution.

A basic element of the rule of law is that a person must be able to know beforehand, with some reasonable degree of certainty, what acts the law proscribes. If a law "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," *Hill v. Colorado*, 530 U.S. 703, 732 (2000), the law violates the certainty requirement inherent in Due Process of Law. As such, the right of the people to know when they have violated the law is deserving of greater safeguard than the convenience of the enforcing agency. But the Clean Water Act program is beyond the comprehension of ordinary people. The very definition of "wetlands" defies common sense. Federal regulations define "wetlands"as those areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b). Under this definition, an area need be wet only "for one to two weeks per year." Gordon M. Brown, *Regulatory Takings and Wetlands: Comments on Public Benefits and Landowner Cost*, 21 Ohio N.U. L. Rev. 527, 529 (1994). In other words, a "wetland" may be mostly dry land that no reasonable

person would conclude is subject to federal jurisdictional control as a wetland.

This Court long has held that "before a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute." *United States v. Gradwell*, 243 U.S. 476, 485 (1917). *See also United States v. Lanier*, 520 U.S. 259, 267 (1997). But the confusion among the circuits in post-*Rapanos* cases, and the inherent chaos of the Clean Water Act enforcement regime, provide no such clarity. This Court should grant the Petition and resolve this conflict, engendered by this Court's split decision in *Rapanos*, by cabining federal power in a manner appropriately respectful of the individual's fundamental constitutional rights.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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